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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BOIS, AGO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: EAC 01 184 51088 Office: Vermont Service Center Date: JUN 19 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner has requested oral argument in this matter. A request for oral argument must set forth facts explaining why such argument is necessary to supplement the appeal. 8 C.F.R. § 103.3(b). Oral argument will be denied in any case where the appeal is found to be frivolous, where oral argument will serve no useful purpose or where written material or representations will appropriately serve the interests of the applicant.

The applicant's request stated that the business structure and relationships between [redacted] and [redacted] Company are complex and may require additional explanation. Further, the petitioner stated that the accrual method of accounting and the renegotiation of terms with its vendors had a great impact on its tax returns, and that this too might require additional explanation. The petitioner did not establish that written material could not appropriately serve its interests. As such, the petitioner did not establish that oral argument is necessary in this case. Accordingly, the request for oral argument is denied.

The petitioner is a recording studio and music producer. It seeks to employ the beneficiary permanently in the United States as a recording second engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any

> petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on July 9, 1998. The proffered salary as stated on the labor certification is $22,350 per year.

With the petition, counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the Vermont Service Center, on September 4, 2001, requested evidence pertinent to that ability. The Service Center also specifically requested that if the petitioner employed the beneficiary during 1997, 1998, 1999 or 2000 it provide copies of Form W-2 wage and tax statements showing the amounts it paid to the beneficiary.

In response, counsel submitted an unaudited profit and loss statement for 1998 for [redacted] Counsel also submitted an unaudited profit and loss statement for the petitioner for 2000 and the petitioner's projected revenue statement for 2001. In addition, counsel submitted an unaudited profit and loss statement for the petitioner for January through October 2001.

Further still, counsel submitted 1998 and 1999 Form 1120S U.S. income tax return for an S corporation of Prophet Media Group, Inc., and the petitioner's 1999 and 2000 Form 1065 U.S. partnership tax returns.

[redacted] 1998 tax return shows that during that year [redacted] declared a loss of $269,477 as its ordinary income. The corresponding Schedule L shows that at the end of that year, [redacted] current liabilities exceeded its current assets.

[redacted] 1999 tax return shows that [redacted] declared an ordinary income of $158,154 for that year.

The petitioner's 1999 tax return shows that it declared a loss of $18,313 as its ordinary income during the year and that at the end of the year its current liabilities exceeded its current assets.

The petitioner's 2000 tax return shows that it declared an ordinary income of $10,123 during the year and that at the end of the year its current liabilities exceeded its current assets.

Further still, counsel submitted a 2000 Form W-2 wage and tax statement showing that the petitioner employed the beneficiary and paid him $2,508.33 during the year.

Finally, counsel submitted a payroll earnings report showing that from January 1, 2001 through October 23, 2001 the petitioner paid the beneficiary $30,099.96 in wages.

An accompanying letter, dated May 3, 2000, from the petitioner [redacted] to the Massachusetts Department of Labor states that the petitioner was formed during April of 1999 when [redacted] went out of business.

On February 26, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, the petitioner submits unaudited profit and loss statements of [redacted] for all four quarters of 1998. The petitioner also submits a payroll earnings report for [redacted] showing the amount that company paid to its employees. The report states that it covers the period from December 31, 1998 through December 31, 1998, which is obviously in error.

Further, the petitioner provides the 1995 and 1996 Form 1065 U.S. partnership returns of [redacted] Even if [redacted] Studio were shown to be the same entity as the petitioner, its finances during 1996 would not be directly relevant to this petition, as the priority date of the petition is July 9, 1998.

In an undated letter, the former CEO of [redacted] states that the company's losses in some years and low profits during others were the result of aggressive tax reporting and do not accurately represent the petitioner's cash position.

According to 8 C.F.R. § 204.5(g)(2) the three types of evidence

competent to demonstrate the petitioner's ability to pay the proffered wage are copies of annual reports, federal tax returns, or audited financial statements. The petitioner was not obliged to demonstrate its ability to pay the proffered wage with its tax returns, but chose to do so. In the alternative, it could have submitted copies of its annual reports or audited financial statements, but chose not to do so. In light of this election, the petitioner shall not now be heard to argue that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

The petitioner has stated that the corporate relationship between the petitioner, [redacted], and [redacted] is complicated. For the purpose of this decision, it is not.

The petitioner filed under the name [redacted] LLC. The suffix indicates that it is a limited liability company. As such, the owners of that company, whether those owners are individuals, corporations, or both, are not obliged to pay the petitioner's debts and obligations out of any funds except the petitioner's own company funds. As no other entity is obliged to pay the petitioner's debts and obligations, no funds other than those of the petitioner shall be included in the computation of the petitioner's ability to pay the proffered wage.

The tax returns of the petitioner, [redacted] LLC, are the only competent evidence in the record pertinent to the petitioner's ability to pay the proffered wage. Those returns do not indicate that the petitioner was able to pay the proffered wage during 1999 and 2000. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.